1994

Orem City v. Solomon : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

- -

OREM CITY,

Plaintiff-Appellee,

vs. Case No. 940318-CA

CHRISTOPHER J. SOLOMON,

Defendant-Appellant.

- -

APPELLANT'S REPLY BRIEF

- -

Appeal from the Judgment of the
Fourth Circuit Court, Orem Department
Utah County, State of Utah
Honorable Joseph I. Dimick

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The following reply is made to Respondent's Brief filed April 18, 1995. The respondent has made a number of arguments in opposition to those raised by Appellant. Although Appellant argued only two points of law in his Brief, Respondent replied with ten separate subdivisions. Moreover, no attempt has been made by the respondent to specifically relate its arguments to the pages contained in the Brief of Appellant. For this reason, therefore, Appellant will assume that all points except for No. 3 stated in Respondent's Brief apply to Appellant's First Point of Law and that Point 3 relates solely to Appellant's Second Point of Law.

For the convenience of the Court, therefore, Appellant will refer to the specific arguments made by the respondent in the same order that they are addressed. Rather than rephrasing the arguments in Appellant's favor, the argument made by Repondent will merely be repeated in order to avoid further confusion.

ARGUMENT

I. THE LOWER COURT ERRED IN CONCLUDING THAT DEFENDANT WAS GIVEN A SUFFICIENT WARNING OF THE CONSEQUENCES OF ALLOWING A BLOOD DRAW TO SATISFY CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

RESPONDENT'S POINT 1 ARGUMENT: "Where a DUI Suspect is Arrested the Government Has no Affirmative Duty to Show Consent." (Respondent's Brief at 9-11).

Respondent argues that "where a DUI suspect is under arrest, the government has no affirmative duty to show consent to submit to a BAC test, because such consent is implied by law." (Respondent's Brief at 9). The respondent, however, has confused the terms of "consent" with the concept of "refusal". It is clear under Section 41-6-44.10 that an officer must explain to an arrested person that he requests that an alcohol or blood sample be given. Moreover, he must inform the person that if he "refuses" to submit to the test then he may lose his license to operate a motor vehicle. Subsections (2),(a), (b), (f), (3), and (8) all refer to the term "refused" or "refusal".

Clearly, even in the civil context of administrative license hearings, the question of "refusal" is one of the issues to be determined. [§41-6-44.10(2)(f)(ii)]. "Refusal is defined as declining to accept or submit to a command." Webster's New World Dictionary, 2d Ed. p. 1195. Thus, the "implied consent" is only effective until the point in time when the defendant "refuses" to comply. When a defendant chooses to refuse then the implied consent is revoked.

If a person has the right to refuse to a breath or blood

test, then that person must be given sufficient information upon which to make a determination of refusal. The government has a statutory and constitutional duty to inform that person sufficiently to allow the implied consent to continue or be revoked. The failure to clearly inform an arrested driver as to his right of refusal can quite correctly be said to have also been a failure to inform the driver as to his right to continue the implied consent. Regardless of the linguistic niceties, the statute requires a duty of the arresting officer as to the defendant and therefore the respondent's argument that no duty is required on the part of the government to show "consent" is totally groundless. Clearly, if a defendant is not properly informed or is informed falsely as to the consequences of the testing, then his "consent" is not valid because he was not properly informed of his right to "refusal" which is clearly required.

RESPONDENT'S POINT 2 ARGUMENT: "Defendant's Hearing Impairment Does Not Constitute Withdrawal of His Implied Consent." (Respondent's Brief at 11-13).

Appellant would agree that per se a hearing impaired person does not receive an automatic advantage over a person with normal hearing. However, Utah law contrary to the law of Georgia requires that a person be informed that he does have a choice to refuse to take the breath or chemical test. If a person has not been properly informed of this right to refuse because of a language problem or hearing problem, then under Utah law that person has been denied their right of refusal

contained in Section 41-6-44.10, U.C.A.

The Utah Legislature recognized that a person is not constitutionally required to consent to any chemical or breath test as to a criminal prosecution and therefore devised the present system to encourage a voluntary submission of such test at the threat of civilly losing a driver's license. Interest of R.L.I., 771 P.2d 1068 (Utah App. 1989). Regardless of what may be said as to civil proceedings involving refusal and suspension of a driver's license. Constitutional criminal rights cannot be waived or discarded if a person is not fully informed of the consequences of their refusal.

The state argues that Section 41-6-41.10(3), U.C.A. is applicable to this case on the theory that a person who is deaf is equivalent to a person who is "dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test." It would be interesting for the prosecutor to make this argument to a handicap association of deaf persons effectively telling them that they are entitled to no more rights than a dead person.

The aforesaid statute was designed to cover situations in which injured or totally intoxicated persons unable to knowingly make decisions regarding refusal could be administered the test in order to preserve necessary evidence of blood alcohol content especially in cases involving death and serious injury. This statute was never designed to excuse police officers from making a good faith attempt in communicating with hearing impaired individuals, people speaking other languages, or other

communication disabilities that have nothing to do with physical or mental incapacity.

Essentially, Respondent is requesting this Court to excuse police officers from making any effort to communicate to this special class of individuals that the statutory admonition requires. Under Respondent's theory, any Spanish-speaking defendant could be physically forced to give blood with no effort being required to obtain an interpreter to explain the procedures and consequences. Such a result is absurd and would violate all constitutional criminal law protections against defendants regardless of their handicap or language ability.

RESPONDENT'S POINT 3 ARGUMENT: "Officer Newren Met His Duties Under the Implied Consent Law." (Respondent's Brief at 15-19).

If it is assumed arguendo that Officer Newren sufficiently conveyed the necessary civil warnings to the defendant concerning the loss of his license if he refused to submit to the test, then the arguments made by Respondent are correct as to the civil proceeding and civil requirement. However, Appellant in his brief has contended that a defendant must also be warned in the crminal context that any evidence obtained from the blood draw could be used against him in a criminal conviction and furthermore that any refusal to allow a blood draw could also be used in a criminal trial against him. The latter requirement is specifically spelled out in §41-6-44.10(8), U.C.A. (Appellant's Brief at 12-13). Since the present context of this appeal is a criminal prosecution and not

an administrative proceeding as to license suspension, the argument as to whether Officer Newren correctly complied with the civil standard is only of secondary interest in light of the other arguments requiring a defendant to be sufficiently informed of his rights of refusal in the criminal context.

RESPONDENT'S POINT 4 ARGUMENT: "Non-compliance With Section 41-6-44.10 Does Not Render Chemical Test Results Inadmissible in a Criminal Proceeding. (Respondent's Brief at 19-25).

The discussion by the respondent relating to this issue is accurate but irrelevant. This is not a case in which the wrong type of test was administered or where defendant was not properly offered a choice of tests as in the cases cited by the respondent in its brief. Instead, the sole issue in this case is whether Defendant was properly warned by the officer in the context of a criminal prosecution that he had the right to refuse a blood test or that such refusal could be used against him in a criminal prosecution.

The cases cited by Respondent hold that the procedures for the civil revocation of a license and that for a criminal prosecution are not necessarily dependent upon one another. Thus, if a person has been found to voluntarily consent to a blood draw after a proper constitutional warning was given, such draw can be used in a criminal case even though the test itself may turn out to be deficient for revoking the person's license. Conversely, a person may be properly informed as to the civil liability for failing to take a blood test which therefore renders his license suspendable and yet not fully be informed

for purposes of a criminal prosecution as to the question of informed consent.

The Legislature in Section 41-6-44.5(1)(b) has indicated that the compliance with the civil implied consent statute or noncompliance of the statute does not govern a criminal proceeding but that it is the rules of evidence or the constitution that controls. This is exactly the contention of the defendant that the Constitution of the United States and of Utah requires an adequate warning and an informed consent before blood can be drawn for criminal prosecution purposes regardless of the effect upon the civil administrative proceeding.

The bottom line is simply that the state cannot require a defendant to submit to breath or blood tests for purposes of criminal prosecution merely by enacting an implied consent law relating to drivers licenses. The United States Constitution and Article 1, Section 14 of the Utah Constitution, protect individuals from unreasonable searches and seizures. Cupp v. Murphy, 412 U.S. 291 (1973); State v. Easthope, 668 P.2d 528, 531-32 (Utah 1983). The question of voluntary "consent" as to the driver license revocation and "consent" as to the drawing of blood under the Fourth Amendment does not make these inquiries the same especially as to the warning that must be given to the defendant as to both civil and criminal procedures.

Thus, in summary, whether the officer did or did not give a sufficient consent warning under the requirements of the civil law is immaterial in determining the admissibility of the blood draw as to the criminal prosecution. This non-issue raised by

the respondent simply adds more confusion to this already muddled area of law.

RESPONDENT'S POINT 5 ARGUMENT: "The Rules of Evidence Did Not Preclude Admission of Defendant's Blood Test." (Respondent Brief at 25).

Defendant's counsel stipulated that were the technicians called to testify in the trial, they would testify that Defendant's blood test showed a .15% of alcohol content. As correctly noted by Respondent, no evidentiary objection was made in this case since the issue was not the accuracy of the blood test, but simply whether the blood test should be admitted at all because of the failure to provide constitutional warnings to the defendant.

RESPONDENT'S POINT 6 ARGUMENT: "Defendant's Constitutional Right to be Free From Unreasonable Search and Seizure Was Not Violated." (Respondent's Brief at 26-28).

Again, Defendant does not disagree with the authorities cited by the respondent concerning circumstances in which a forced blood draw can be in compliance with the Fourth Amendment of the United States Constitution. This issue, however, only becomes relevant when a defendant has refused to give proper consent to a blood draw. In State v. Kruz, 446 P.2d 307 (Utah 1968) the driver of an automobile was involved in a serious accident and was taken to a hospital for examination. At the hospital Kruz was asked by investigating officers to submit to a blood test to determine the alcohol content of his blood. At that time he was not yet arrested. Kruz refused to submit to

the test but a blood sample was drawn against his will and was later admitted into evidence in a negligent homicide trial. The Utah Supreme Court held that implied consent to a chemical test arises only upon arrest and that prior to arrest actual consent must be given. This Court, however, has carried the Kruz decision further by recognizing that the implied consent law was not intended by the Legislature to create a consent search but was utilized only to create a means of non-physical persuasion. Interest of I.R.L.I., 739 P.2d 1123 (Utah App. 1987).

In the instant case, the state relied entirely upon the voluntariness of Defendant's consent in giving the blood. At no time did the state request the court to make the Schmerber determination that the blood draw was proper even without Defendant's consent. While the court made oral findings unrelated to this issue as to the question of probable cause and the time of Defendant's arrest, it made no oral finding whatsoever as to whether the method of blood extraction was reasonable.

In short, no argument was ever made below that the city had the right to proceed to draw blood against Defendant's will because it had met constitutional requirements of search and seizure. Instead, throughout the proceeding, the city argued that Defendant had knowingly given his consent for such a blood draw and therefore it was admissible.

RESPONDENT'S POINT 7 ARGUMENT: "Defendant's Miranda Rights Were Not Violated." (Respondent's Brief at 29).

Respondent asserts that "in the instant case there is no

record evidence showing Defendant ever asked about Miranda." (Respondent's Brief at 29). This is true. However, there is also no record evidence that a Miranda warning was ever given to the defendant at the time of his arrest. (Suppression Hearing at 6).

Once again, the respondent has raised a non-issue. Defendant is not claiming any deficiency relating to a Miranda warning but is instead asserting that constitutional due process requires that a defendant be informed not only that his refusal to take a blood or breath test can result in the revocation of his drivers license, but also that such refusal can be introduced as evidence in a criminal prosecution or, in the alternative, if the defendant consents then the test results can also be introduced.

It is only when all of these elements are given to a defendant that he can make an informed consent as to the license revocation proceeding and the search and seizure issue related to the criminal prosecution. To only inform the defendant as to the negative consequences as to the drivers license and not as to the negative consequences as to the crimnal prosecution, eliminates the elements of informed consent and voluntariness required for a valid breath or blood draw under the Fourth Amendment.

RESPONDENT'S POINT 8 ARGUMENT: "Defendant's Right to Counsel Was Not Violated." (Respondent's Brief at 29-30).

Defendant does not contest this argument of Respondent.

RESPONDENT'S POINT 9 ARGUMENT: "Even if Defendant Did Not

Consent, Defendant's BAC Test Was Admissible." (Respondent's Brief at 30-31). Defendant believes that this is merely a rewording of Respondent's prior argument concerning search and seizure (Respondent's Brief at 26-28) and therefore refers the Court to Defendant's response, supra.

II. ASSUMING ARGUENDO THAT PROPER WARNINGS WERE GIVEN TO THE DEFENDANT, THE LOWER COURT NEVERTHELESS ERRED IN RULING THAT THE DEFENDANT HAD KNOWINGLY CONSENTED TO A BLOOD DRAW.

The respondent agrees to the legal standard to be utilized in determining whether Defendant voluntarily consented to the blood draw for purposes of the criminal prosecution. (Respondent's Brief at 13-15). Thus, the only question is whether the lower court correctly ruled as a matter of fact that Defendant had voluntarily consented to the blood draw after being properly informed under constitutional requirements.

While this Court normally defers to the factual findings of a trial court relating to consent, State v. Webb, 790 P.2d 65 (Utah App. 1990) it is normally required in suppression hearings that specific detailed written findings of fact are given by the trial court to enable the appellate court to adequately review the trial court's decision. State v. Marshall, 791 P.2d 880, 882 (Utah 1990). In the instant case no such written findings were made and both parties have instead relied solely upon the evidence that was offered during the suppression hearing.

As noted in Appellant's Opening Brief, in the oral decision the best that the court concluded was that the government

"thought they had actual consent". (Suppression Hearing at 37). The Utah Supreme Court in Holman v. Cox, 598 P.2d 1331, 1333 (Utah 1979) held that in determining whether a defendant has consented for purposes of the civil drivers license revocation, the circumstances must be looked at objectively in terms of the behavior of the driver from a disinterested bystander.

This same test should be applied in determining consent for purposes of the criminal prosecution. Unfortunately, however, the lower court did not make the required factual findings necessary to make this objective evaluation thereby requiring at a minimum a "remand" for a rehearing on this critical issue. State v. Sterger, 808 P.2d 122 (Utah App. 1991).

However, Defendant asserts that a factual remand is not required since the evidence as painted even most favorably by the respondent shows that the defendant was seriously hearing impaired, that the officer did not have the standardized written consent form which could have been shown to the defendant to read, and that the actual consent forms which were signed by the defendant were ambiguous and made no mention whatsoever of either driver license revocation or criminal prosecution. Defendant contends as a matter of law, that the defendant did not actually consent to the blood draw.

The state relied entirely upon voluntary consent for the blood test. It did not produce any evidence required under Schmerber v. California, supra, allowing a non-consentual search and seizure of Defendant's bodily fluids. The Court did not address this issue nor was it raised by the parties. Thus,

if this Court finds after reviewing the evidence most favorably to the respondent that there is insufficient evidence to show an objective consent was given by the defendant, then this matter must be dismissed and not remanded.

CONCLUSION

Based upon the arguments raised addressed herein, Defendant is entitled to a dismissal of this action or, at a minimum, to a remand for further factual findings.

DATED this 12th day of June, 1995.

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing to Ed Berkovich, Orem City Prosecutor, 56 North State, Orem, Utah 84057 this 12th day of June, 1995.